

VIRGINIA WASTE MANAGEMENT BOARD ENFORCEMENT ACTION

CONSENT ORDER

ISSUED TO

FAIRFAX COUNTY SCHOOL BOARD

AND

SOUTHWEST RECREATIONAL INDUSTRIES, INC.

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code (“Code”) ' ' 10.1-1182 *et seq.* and ' ' 10.1-1402, 10.1-1405, and 10.1-1455 between the Virginia Waste Management Board, the Fairfax County School Board and Southwest Recreational Industries, Inc. for the purpose of resolving certain alleged violations of the Virginia Hazardous Waste Management Act and the Virginia Hazardous Waste Management Regulations.

SECTION B: Definitions:

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. “VHWMR” and “Regulations” mean the Virginia Hazardous Waste Management Regulations set forth at 9 VAC 20-60-12 *et seq.* The Regulations at 9 VAC 20-60-124, 260-266, -268, -270, -273 and -279 adopt by reference certain provisions of Title 40 of the Code of Federal Regulations (“CFR”). Citations made herein will be to the relevant section of the CFR which are incorporated by reference into the Regulations.

2. “Board” means the Virginia Waste Management Board, a permanent collegial body of the Commonwealth of Virginia and described in Code ' ' 10.1-1401 and 10.1-1184.
3. “Department” or “DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Code ' 10.1-1183.
4. “Director” means the Director of the Department of Environmental Quality.
5. “Order” means this document, also known as a Consent Order.
6. “School Board” means Fairfax County School Board.
7. “Floor-Tec” means USA Floor-Tec, Inc.
8. “NVRO” means the Northern Virginia Regional Office of DEQ, located in Woodbridge, Virginia.
9. “Southwest” means Southwest Recreational Industries, Inc.

SECTION C: Finding of Facts and Conclusions of Law

1. In April 2000, the School Board entered into a contract with Southwest to replace the gym floor at Robinson Secondary School (Robinson). Shortly before entering into the contract, the School Board learned through testing that the flooring material contained mercury in excess of the regulatory limit of 0.2 mg/L.
2. Based on the test results of the flooring material, the School Board developed an addendum, dated March 14, 2000, to the initial project noting that the flooring material should be disposed as a hazardous waste and requiring certified proof of disposal. Southwest acknowledged the addendum on March 15, 2000, and the requirements became a part of Southwest’s contractual obligations to the School Board. The original contract terms and addendum together are referred to as the “Prime Contract”.
3. On June 13, 2000, Southwest entered into a subcontract agreement with Floor-Tec for the gym floor replacement project. The subcontract agreement stated that the flooring material had been tested and indicated “a higher than normal level of mercury”. Floor-Tec stated that they questioned whether the statement “a higher than normal level of mercury” meant that the flooring was classified as hazardous. Floor-Tec stated that they were told by

Southwest that it was not hazardous and there were

no special requirements. Southwest stated that Floor-Tec was aware that the flooring material contained elevated levels of mercury and that the subcontract, which incorporated the Prime Contract, included the addendum requiring the disposal of the flooring material as hazardous waste.

4. Floor-Tec removed the gym floor and disposed of the waste flooring material on July 14, 17, and 19, 2000.
5. On October 15, 2001, DEQ received a letter dated October 12, 2001, from an attorney for the School Board. The letter stated that after numerous attempts to obtain information regarding the proper disposal of the flooring material, no information was provided that would identify the appropriate disposal of the waste flooring material. As a result of the lack of information, the School Board notified DEQ of the situation.
6. Based on the information provided to DEQ on October 15, 2001, DEQ issued the School Board a notice of violation on December 19, 2001, alleging failure to comply with 40 CFR Part 262, Standards Applicable to Generators of Hazardous Waste and 40 CFR Part 268, Land Disposal Restrictions, as incorporated into the VHWMR.
7. Upon discussions with the attorney for the School Board, DEQ faxed a list of questions to the attorney in an attempt to ascertain additional information regarding the disposal of the waste flooring material. On February 22, 2002, DEQ received a response from the attorney stating that the School Board had no additional information to provide. In addition, the attorney advised DEQ that they forwarded a copy of the questions to the attorney for Southwest.
8. On February 25, 2002, through legal counsel, Southwest advised DEQ that Southwest was unable to provide a certification of hazardous waste disposal to the School Board despite repeated attempts by Southwest to obtain the information from Floor-Tec. Nonetheless, based on Southwest's contractual obligations to the School Board, Southwest has agreed to accept responsibility for resolving the alleged noncompliance on behalf of the School Board.
9. On March 12, 2002, DEQ sent a Request for Information letter to Floor-Tec seeking information concerning the management, treatment, storage, transportation, and disposal of the waste flooring material.

10. On April 4, 2002, DEQ received a response from Floor-Tec stating that at no time prior to or during the removal and disposal project, had they any knowledge that the flooring material was to be treated as hazardous material. Floor-Tec states that it was

not until April 2001 that Floor-Tec received information that the flooring material was hazardous waste, approximately nine months after the disposal.
11. Southwest maintains that Floor-Tec was aware of the elevated levels of mercury in the flooring material and, upon entering into the subcontract incorporating the Prime Contract, Floor-Tec was obligated to manage the waste flooring material as hazardous waste. Southwest also denies any allegations or suggestions by Floor-Tec in its statements to DEQ that Southwest misrepresented in any way the requirements for management of the flooring material.
12. Based on the information provided to DEQ by all parties, DEQ issued this Consent Order to the School Board and Southwest.
13. Appendix A of this Order requires the School Board to develop, submit for review, and implement upon approval, an internal review procedure designed to ensure that its contractors appropriately manage the County's hazardous waste.
14. On July 8, 2002, the School Board submitted to DEQ for review and approval, an internal review procedure designed to ensure that its contractors appropriately manage the County's hazardous waste.

SECTION D: Agreement and Order

Accordingly the Board, by virtue of the authority of Code " 10.1-1182 *et seq.* and " 10.1-1402, 10.1-1405, and 10.1-1455, orders the School Board, and the School Board agrees to comply with the terms of Appendix A of this Order. In addition, the Board orders the School Board and Southwest, and the School Board and Southwest voluntarily agree to pay a civil charge of \$8,000.00 within 30 days of the effective date of this Order in settlement of the alleged violations cited in this Order. Payment shall be made by check payable to "Treasurer of Virginia" and sent to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, VA 23240

Either on a transmittal letter or as a notation on the check, the School Board and Southwest shall indicate that this payment is submitted pursuant to this Order and shall include the Federal Identification Numbers for Fairfax County School Board and Southwest.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of the School Board and Southwest, for good cause shown by the School Board and Southwest, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those alleged violations specifically identified herein, including those matters addressed in the Notice of Violation issued to the School Board by DEQ on December 19, 2001. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein or any defense to such actions by the School Board or Southwest.
3. By entering into and for purposes of this Order and for subsequent actions with respect to this Order, the School Board and Southwest do not contest the jurisdictional allegations contained herein, but they do not admit to them, the factual findings, and conclusions of law contained herein. Southwest enters into this Consent Order solely as the result of and to fulfill certain of its contractual obligations to the School Board and to settle the allegations contained herein with the Board and DEQ.
4. The School Board and Southwest consent to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. The School Board and Southwest declare they have received fair and due process under the Administrative Process Act, Code ' ' 9-6.14:11 *et seq.*, and the Virginia Waste Management Act, Code ' ' 10.1-1400 *et seq.*, and waive the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as

a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board or the Director to enforce this Order or any matter not resolved by this Order.

6. Failure by the School Board and Southwest to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violation(s).

Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority or any defenses the School Board or Southwest may have to such action.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. The School Board and Southwest shall each be responsible for its respective failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. The School Board and Southwest shall each show that such circumstances were beyond its respective control and not due to a lack of good faith or diligence on its part. The School Board and Southwest shall each notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay its compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and, if applicable, the date full compliance will be achieved.

Failure to so notify the Regional Director within 72 hours of learning of any condition above, which a party intends to assert will result in the impossibility of compliance, shall constitute a waiver by that party of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee, the School Board, and Southwest. Notwithstanding the foregoing, the School Board and Southwest agree to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
 - (a) The School Board and Southwest petition the Director or his designee to terminate the Order after all of the requirements of the Order have been completed, as confirmed by the Department, and the Director or his designee approves the termination of the Order;
 - (b) The Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to the School Board and Southwest.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve the School Board and Southwest from their respective obligations to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By their signatures below, the School Board and Southwest voluntarily agree to the issuance of this Order.

And it is so ORDERED this day of _____, 2002.

Robert G. Burnley, Director
Department of Environmental Quality

Fairfax County School Board voluntarily agrees to the issuance of this Order.

By: _____

Date: _____

Consent Order

Fairfax County School Board/Southwest Recreational Industries, Inc.

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City/County of _____

The foregoing document was signed and acknowledged before me this ____ day of

_____, 2002, by _____, who is
(name)

_____ of the Fairfax County School Board.
(title)

Notary Public

My commission expires: _____.

Southwest Recreational Industries, Inc. voluntarily agrees to the issuance of this Order.

By: _____

Date: _____

State of Texas
City/County of _____

The foregoing document was signed and acknowledged before me this ____ day of

_____, 2002, by _____, who is
(name)

_____ of Southwest Recreational Industries, Inc.
(title)

Notary Public

My commission expires: _____.

APPENDIX A
SCHEDULE OF COMPLIANCE

The School Board shall:

1. By July 15, 2002, develop and submit for review and approval to DEQ, an internal review procedure designed to ensure appropriate hazardous waste management by contractors performing work for or on behalf of the School Board.
2. Within 30 days of receipt of any comments from DEQ, submit in writing, a revised procedure addressing DEQ comments, until such time as the procedure is approved by DEQ.
3. The School Board shall implement the procedure following receipt of written approval from DEQ.